

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

SHIRLEY A. SACKOWSKY,	:	
	:	C.A. NO. 04-03-131
Defendant below,	:	
Appellant,	:	
	:	
vs.	:	
	:	
MICHAEL SHAHAN, Director of	:	
DIVISION OF MOTOR VEHICLES,	:	
DEPARTMENT OF TRANSPORTATION,	:	
	:	
Plaintiff below,	:	
Appellee.	:	
	:	

Submitted: March 26, 2009

Decided: March 26, 2009

On appeal from Division of Motor Vehicles

Affirmed.

Eric G. Mooney, Esquire, 11 South Race Street, Georgetown, Delaware 19947, Attorney for Appellant.

Frederick Schranck, Esquire, Department of Transportation, Post Office Box 778, Dover, Delaware 19903-0778, Attorney for Appellee.

Trader, J.

In this civil appeal from the Division of Motor Vehicles, Department of Public Safety, I hold that that there was substantial evidence to support the finding of the hearing officer that there was probable cause to believe that the defendant was driving a motor vehicle under the influence of alcohol and that she refused to consent to the breath test. Accordingly, the decision of the hearing officer is affirmed.

The relevant facts are as follows: On April 12, 2003, at approximately 1:38 A.M. Corporal Maher of the Delaware State Police was dispatched to an accident near Jefferson Bridge on Route 1, south of Bethany Beach, Sussex County, Delaware. Upon his arrival at the scene, he observed a red Mustang on its side in the ditch partially submerged in water. There were also two police officers at the scene of the accident when Cpl. Maher arrived.

Officer Burton told Cpl Maher that he had the operator of the vehicle and her son in his police vehicle. Officer Burton also stated that there was a witness at the scene of the accident who told him that two persons were walking away from the scene of the accident on the opposite side of the roadway in the area of the Cottage Café. Officer Burton stated that he had driven up to that area and located two persons walking in the area of the Cottage Café and he drove them back to the scene of the accident in his police car. Upon his initial contact with them, he questioned them concerning their business abroad and who they were. The defendant advised Officer Burton that she was the driver of the vehicle and she and her son had been in an accident.

When Cpl Maher opened the door of the city police officer's vehicle, he detected a strong odor of alcoholic beverage emanating from the vehicle. The defendant informed him that she was the driver of the vehicle.

On this evening, it was raining extremely hard and there was a curve in the roadway. It was also dark in the area of the accident. Because of the weather and road conditions, he took the defendant back to the Bethany Beach Police Department for further investigation. When the defendant got out of the police vehicle and walked to the rear door of the Bethany Beach Police Station, she was unsteady and inside the station, she used the walls for support.

The police officer then explained to the defendant that they were going to do some field tests. At this point, the defendant said, “You don’t need to that, I am drunk, and I should not have been driving.”

At this point, certain field tests were conducted. The defendant was asked to recite the alphabet from D to T. She stated the alphabet correctly from E to L and ran L-M-N-O-P together. She stopped and stated, “I can’t do that.” On the one-leg stand test, she was swaying the entire time and she placed her foot down three times, as well as using the walls for support five times. On the finger-to-nose test, she missed her nose with her middle finger on her right hand and the index finger on her left hand. On the walk and turn test, she fell off the line, used the wall for support, and after walking three steps, she said she couldn’t do that. The defendant was asked to take a PBT test but she refused. The officer also observed her outside of the vehicle and he detected a strong odor of alcohol emanating from her breath. Her eyes were watering, blood shot and glassy and during the investigation her attitude changed considerably and she became uncooperative and belligerent as well as profane.

At this point he read the implied consent law to her and told her that if she refused to submit to the chemical test that her driving privileges would be revoked. After reading

the implied consent law to her and advising her of the penalties, she refused to submit to the breath test.

The hearing officer determined by a preponderance of the evidence that there was probable cause to believe that the defendant was driving a motor vehicle under the influence of alcohol. She also established that the defendant refused to take the breath test after being informed of the penalty of revocation for such a refusal.

The defendant first contends that Officer Burton arrested the defendant when he first placed her in his patrol car. I disagree.

Under 11 *Del. C.* §1902(a), a peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination. Under 11 *Del. C.* §1902(b) any person so questioned who fails to give identification or explain her actions to the satisfaction of the officer may be detained and further questioned and investigated. The purpose of 11 *Del. C.* §1902 is to "legalize the questioning and detention of person without probable cause where the *express criteria* of this section were met." *Hicks v. State*, 631 A.2d 6 (Del. 1993).

Reasonable grounds as used in 11 *Del. C.* §1902(a) means reasonable and articulable suspicion and is a lesser standard than probable cause. *State v. Deputy*, 433 A.2d 1040, 1043 (Del. 1981). If detention is indicated by the circumstances there must be strict compliance with express terms of the statute. *State v. Bowden*, 273 A.2d 481, 484 (Del. 1971). "It is well settle that 'an investigatory detention must be minimally intrusive and reasonably related in scope to the circumstances which justify the interference.'" *Bunting v. State*, 860 A.2d 809, 2004 WL 2297395, at *2 (Del.).

In the case before me, the defendant was abroad and the police officer has reasonable grounds to suspect that the defendant committed the offense of careless driving in violation of 21 *Del.C.* §4176(a) and driving under the influence in violation of 21 *Del. C.* §4177(a). Since the defendant admitted that she was the driver of the vehicle involved in the accident and there was a strong odor of alcohol on her breath, there was a reasonable and articulable suspicion that she drove a vehicle under the influence of alcohol. The defendant did not explain her actions to the satisfaction of the officer, she was returned to the scene of the accident and detained. I conclude there was a reasonable and articulable suspicion to detain her under 11 *Del.C.* §1902.

The defendant next contends that there was no evidence of probable cause at the time the defendant was transported back to the police station. She argues that she was arrested at the time Corporal Maher placed her in his police vehicle and transported her to the Bethany Beach Police Department. The defendant's contention is incorrect.

The circumstances in this case presented no suitable or safe means of conducting the requisite tests at the scene. *Williams v. Shahan*, 1993 WL 81264, at *2 (Del. Super. Ct.) In *Williams v. Shahan*, the circumstances were a narrow and highly curved roadway, lack of paved surface and rain. Similarly in the case before me, there was heavy rain, a curved roadway, and insufficient light to conduct the tests. Accordingly, I hold the defendant was detained for further investigation and arrested after the administration of all of the coordination tests.

Finally the defendant contends that there was no evidence introduced as to the time of driving and the Division cannot establish probable cause that the defendant was under the influence of alcohol at the time of driving. The defendant's contention is incorrect.

In the case before me, Cpl. Maher was dispatched to the scene of the accident at 1:38 A.M. A short time prior to Cpl. Maher's arrival, Officer Burton had arrived at the scene of the accident, and shortly thereafter he found two persons walking away from the scene on the opposite side of the roadway. The defendant advised the police officer that she was the driver of the vehicle and had been in an accident. It is reasonable conclusion that she had driven the vehicle involved in an accident shortly before the time she was stopped walking down the roadway. Based on the above evidence, there was probable cause to believe that she was the driver of the vehicle within four hours of the time she was requested to submit to the chemical test.

I conclude that the defendant was arrested at the police station at the conclusion of all the coordination tests. There was probable cause to believe that she was under the influence of alcohol based on the following factors: an odor of alcoholic beverage on her breath, blood shot, glassy and watery eyes, and the alphabet test, finger-to-nose test, the one-leg stand test, and the walk and turn test were all given and failed by the defendant.

Based on the above conclusions of law, the hearing officer was correct in finding that there was probable cause that the defendant was driving a motor vehicle under the influence of alcohol and she refused to submit to the breath test.

Accordingly, the decision of the Division revoking defendant's driver's license for three months is affirmed.

IT IS SO ORDERED.

Merrill C. Trader
Judge